

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON AT SEATTLE

DONALD MORISKY

Plaintiff,

vs.

MMAS RESEARCH, LLC, a Washington limited liability company, STEVEN TRUBOW, an individual, POLINA FEILBACH, an individual, RODNEY WATKINS, an individual, DUSTIN MACHI, an individual, MMAS Research Italy S.R.L. an Italian company, and MMAS Research France, SAS a French company,

Defendants.

Case No.: 2:21-CV-01301-DWC

**DEFENDANTS' RESPONSE TO  
PLAINTIFF'S MOTION TO STAY  
DOCKET 206**

Defendants hereby respond to Plaintiff's Motion to Stay the Proceedings Docket No 206. Defendants do not oppose the concept of a stay if the Court finds it appropriate but the factual context which Plaintiff has presented would not likely promote either economy in this case nor serve a judicial purpose. Accordingly, this Response is submitted

1 to make clarifications concerning if a stay (or partial stay) would be advantageous to this  
 2 proceeding.<sup>1</sup>

3 **1. Plaintiff is mistaken that the Appeal may resolve the issues of this case.**

4  
 5 Plaintiff has asked Court to stay this action pending a ruling by the Ninth Circuit in  
 6 *MMAS Research, LLC, et al v. The Charite, et al*, 9<sup>th</sup> Cir. Case No. 23-55202. Plaintiff  
 7 states that the appeal may resolve issues in this case.

8  
 9 a. The principal issue in the appeal, however, is not as Plaintiff has stated it to be  
 10 a reversal concerning the Morisky Widget. Rather, it is a procedural question  
 11 of the (CACD) lower Court's error in its failure to properly giving deference  
 12 to this Courts precedential determination that the Morisky Widget is owned by  
 13 MMAS, not Plaintiff. (Docket Nos 84 and 85). A remand for that purpose has  
 been requested-- Namely, the lower Court's failure to properly defer to this  
 Court's precedential determination that the Morisky Widget is owned by  
 MMAS, not Plaintiff.

14 b. Thus, the Ninth Circuit might not determine the ownership of the Morisky  
 15 Widget but rather may remand for procedural considerations or other questions  
 (unrelated to this case) for which a remand has been requested.<sup>2</sup>

16 More importantly, the Ninth Circuit appeal centers on a copyright claim related to  
 17 the Morisky Widget. At issue in this case is whether there is a copyright infringement in  
 18 Defendant's other software, the Global Medication Reconciliation Form (GMRF), which  
 19 is completely different software than the Morisky Widget. Thus, the Ninth Circuit Appeal  
 20 would not resolve this case.  
 21  
 22  
 23  
 24

---

25 <sup>1</sup> Plaintiff's Motion incorrectly stated that Defendants oppose their Motion. See Declaration of  
 Patricia Ray Concerning Motion to Stay Proceedings

26 <sup>2</sup> A reversal has been requested, but the appeals court may give the judge below an opportunity  
 27 to remedy its error through a remand.

**2. This Case Implicates a Greater scope of Infringement than can be resolved by the appeal.**

Plaintiff wrongly oversimplifies by stating that this case boils down to each party alleging copyright infringement against the other for their use of the Morisky Widget.<sup>3</sup> The appeal decision cannot resolve the larger scope of infringement that Plaintiff has alleged in this case.

Particularly it would not resolve Plaintiff's allegations of copyright infringement of the MMAS-8 by the Defendants use of the Global Medication Reconciliation Form. (See Plaintiff's Amended and Second Amended Complaints, Dkt. 3 and Dkt. 22, alleging that Defendants copied and are using the Morisky Copyrighted MMAS-8 in connection with Defendants' Global Medication Reconciliation Form ("GMRF") without the authorization of Dr. Morisky). These allegations have nothing to do with the Morisky Widget.<sup>4</sup>

Nor would it resolve the Dkt 94 Counterclaims, Whereas Plaintiff mentions that Counterclaims causes of action #1 and #6 might be impacted by the appeal, but Counterclaims #2,3,4,5,7, and 8 could never be resolved by the 9<sup>th</sup> Circuit Charite decision.

---

<sup>3</sup> Plaintiff oversimplifies in stating that "The case at bar revolves around the same issue – both parties seek declaratory relief regarding ownership of the Morisky Widget copyright, and each alleges copyright infringement against the other for their use of the Morisky Widget."

<sup>4</sup> See also Dkt 47 and Dkt. 40 at 15. Where Plaintiff states that his Second Amended Complaint seeks to enforce the SA (CR2A), that his Copyright Infringement and Trademark Infringement claims are not covered by the SA because they allege "new" acts of infringing.

1       **3. The interests of efficiency and conservation do not favor a stay.**

2               The appeal has been pending for over six months and Plaintiff could have made the  
3 request earlier, but is now catching our case in the midst of being scheduled for discovery  
4 and proceed to trial. Delay seems a needless interruption to the progress made in  
5 proceeding on a schedule toward trial.

6               Plaintiff is simply wrong in stating that a temporary stay “would promote the  
7 orderly course of justice because the pending Ninth Circuit ruling will substantially  
8 simplify, if not entirely resolve, central factual issues and question of law presented.” That  
9 statement is not supported by a congruency of the issues at hand with the questions raised  
10 on appeal.

11               In addition, there is no reason to delay proceeding to hearing on the Counterclaims  
12 on tortious Interference raised in Counter Claims #2,3,4,5,7, and 8. The long pending  
13 matters raised continue to damage Defendants, who would dramatically suffer from a stay  
14 in the proceedings. The importance of this is detailed in the supporting Declaration of Steve  
15 Trubow. The interest of proceeding with the counterclaims is an interest that  
16 counterbalances Plaintiff’s request for a stay.

17       **4. Plaintiff Seeks a Stay with Unclean Hands.**

18               Finally, the timing of this Motion is suspect but may relate to Plaintiff’s submission  
19 of a sham, discredited declaration by the Plaintiff in Docket No. 102, which is also in the  
20 9<sup>th</sup> circuit appeal. Plaintiff submitted a declaration that he was unaware of ongoing  
21 litigation with Charite. This “Morisky Declaration” has been discredited by his own lawyer  
22 in the Charite case, Kenneth Gross. The Morisky Declaration is also an issue on appeal  
23  
24  
25  
26  
27

1 because the CACD decision erroneously relied on it to deny standing to sue, and thereby  
 2 dismiss the case below.<sup>5</sup>

3 The submission of this Declaration (in both cases) constitutes “Unclean Hands.”<sup>6</sup>  
 4 The unclean hands doctrine permits denial of relief where a plaintiff’s conduct would make  
 5 it unfair. It may be raised where a plaintiff’s inequitable behavior demonstrates deceit,  
 6 unconscionability, or bad faith related to the subject matter of that party’s claim. *Kendall-  
 7 Jackson Winery, Ltd. v. Superior Court* (1999) 76 Cal.App.4th 970, 986. “The doctrine  
 8 demands that a plaintiff acts fairly in the matter for which [they] seek [] a remedy. [They]  
 9 must come into court with clean hands, and keep them clean, or [they] will be denied relief,  
 10 regardless of the merits of [their] claim.” *Id* at p. 978.

11 One beneficiary of the unclean-hands doctrine is the courts, as its application  
 12 “protects judicial integrity and promotes justice.”  
 13

#### 14 **5. The Court’s authority to Stay (or partially stay) the Proceeding.**

15  
 16  
 17 <sup>5</sup> The Gross Declaration provides a contemporaneous record of Morisky acting and  
 18 communicating otherwise. Attorney Gross provides emails that undercut the veracity of  
 19 Morisky’s declaration. (Gross Declaration ER 44-45). The Declaration of Attorney Gross (Dkt  
 20 104) attested to the fact that he represented Plaintiff and Defendants in the Charite case and  
 21 declares under threat of perjury that Donald Morisky is not telling the truth. Dkt 103. The Gross  
 22 declaration which was also filed in the CACD case on appeal. The Federal District Court in  
 Los Angeles order which dismissed relied on the Morisky Declaration and the fact that did not  
 join this action or otherwise authorize Plaintiff (MMAS) to pursue the present claim against  
 Defendants. On appeal it is argued that the District Court’s dismissal adopted a fiction that  
 MMAS was not authorized to bring the action.

23 <sup>6</sup>Unclean Hands “is not a legal or technical defense to be used as a shield against a particular  
 24 element of a cause of action. It is an equitable rationale for refusing a plaintiff relief where  
 25 principles of fairness dictate that the plaintiff should not recover, regardless of the merits of  
 [their] claim. It is available to protect the court from having its powers used to bring about an  
 inequitable result in the litigation before it.

Should the Court see the merits of a stay, it has the authority to weigh the benefits and choose among several options. The Court's authority to stay a proceeding is "incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254, 57 S. Ct. 163, 81 L. Ed. 153 (1936). The Ninth Circuit's standard for stay requests is adopted from the preliminary injunction context. *See Leiva-Perez v. Holder*, 640 F.3d 962, 963-66 (9th Cir. 2011); *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983).

Among the competing interests to be weighed when considering a stay pending appeals are "(1) whether the stay applicant has made a strong showing that the issue is likely to succeed on the merits; (2) whether there will be irreparable injured absent a stay; (3) whether issuance of the stay will substantially injure the nonmoving party; and (4) where the public interest lies." *See Andrews v. Plains All Am., L.P.*, U.S. Dist. LEXIS 156631 (CACD 2018). *See also Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S. Ct. 2113, 95 L. Ed. 2d 724 (1987); *see also Leiva-Perez*, 640 F.3d at 964. The "proponent of a stay bears the burden of establishing its need." *Clinton v. Jones*, 520 U.S. 681, 708, 117 S. Ct. 1636, 137 L. Ed. 2d 945 (1997).<sup>7</sup>

<sup>7</sup> A "flexible approach" to balancing these factors, "so that a stronger showing of one element may offset a weaker showing of another [,]" is "appropriate in the stay context." *Leiva—Perez*, 640 F.3d at 964-66. Thus, along this continuum, the factors comprise "two interrelated legal tests." At one end of the continuum, a stay is justified if the moving party shows "a probability of success on the merits and the possibility of irreparable injury." At the other end, the moving party must demonstrate "that serious legal questions are raised and that the balance of hardships tips sharply in its favor." *see also Brown v. Wal-Mart Stores, Inc.*, 2012 U.S. Dist. LEXIS 163731, 2012 WL 5818300, at \*4 (N.D. Cal. Nov. 15, 2012) ("[W]here the movant relies on a 'serious legal question' to satisfy the first prong of the stay analysis, the movant must show that the balance of harm tips sharply in its favor." citing *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132 (9th Cir. 2011)).

As for the merits, just at a minimum, Plaintiff has never addressed, shown, nor provided any evidence as to how they would win against Defendant's counterclaims or their own amended complaint asserting copyright infringement of the GMRF (again, not the Morisky Widget). Obviously, the Ninth Circuit's decision regarding the Morisky Widget would not have any bearing on any copyright claim for the GMRF, and therefore, Plaintiff would not suffer any irreparable harm absent a stay for the Ninth Circuit appeal to finish. Not only would Plaintiff not suffer irreparable harm waiting for the Morisky Widget copyright claim be decided, but Plaintiff would also not be injured in continuing to move forward with its claims against the GMRF.

Finally, there has been no demonstration of public interest that could be helped by granting this stay. Actually, waiting for the Ninth Circuit's decision on the Morisky Widget holds puts Defendant's GMRF clients in limbo, let alone the 200+ Morisky Widget licensees and 356 remaining copyright infringement claims agreed upon in the CR2A between the Parties.

#### **6. It is also within the Courts Discretion to Issue a Partial Stay.**

Should the Court see the merits the of a stay, the option of a partial stay is an available choice. A partial stay of Plaintiff's case would also comport with Plaintiff's desire to direct and manage his portion of the case.

Partial stays have been issued in circumstances where there is a clear reason to wait for resolution of an issue but allow the rest of the case to proceed. One recent example is a case from the Oregon Federal District Court, *Whatley v. Nike, Inc.* 2000 LEXIS 5815. (D. Ore. 2000) There the Court granted a partial stay of issues related to a pending patent

1 reexamination. In that case, Defendant opposed the motion to stay on grounds that the  
 2 litigation has progressed too far to be held up by the speculative possibility of resolution  
 3 through the PTO reexamination proceeding. The Oregon Federal Court noted that the court  
 4 has options lie with the court's sound discretion and inherent authority to manage its docket,  
 5 citing Target Therapeutics, Inc. v. Scimed Life Systems, Inc., 33 U.S.P.Q.2D (BNA) 2022,  
 6 (N.D. Cal. 1995) and ASCII Corp. v. STD Entertainment USA, Inc., 844 F. Supp. 1378,  
 7 1381 (N.D. Cal. 1994).

8  
 9 The outcome in Whatley v. Nike was a partial stay in order to preserve the progress  
 10 toward trial that had been made.<sup>8</sup> While the nature of the issue at the basis of the requested  
 11 stay is different (patent reexamination), there are similarities to our current case in that the  
 12 matter has finally proceeded toward trial and there are other issues (here, at least the  
 13 counterclaims) that may appropriately continue to proceed.

14 In our instant case, a partial stay of Plaintiff's case, allowing the counterclaims to  
 15 continue to discovery and trial might be a satisfactory resolution to "split the baby" and  
 16 address separately the interests of the parties.  
 17  
 18  
 19  
 20  
 21  
 22  
 23  
 24

---

25 <sup>8</sup> Unlike here the Oregon Court was considering a stay for a patent reexamination. But it  
 26 enumerated factors the court should consider include whether the stay would prejudice the  
 27 non-moving party, provide a tactical advantage to the moving party, whether the stay would  
 simplify the issues and whether discovery is complete and/or a trial date set.



Respectfully Submitted on December 18, 2023.

/s/ Patricia Ray

PATRICIA RAY

Attorneys for Plaintiff

Patricia Ray  
Pennsylvania Bar #31989  
The Law Office of Patricia Ray  
1317 Nettles Boulevard  
Jensen Beach, Florida 34957  
Telephone: 215-908-6810  
[raypatricia@yahoo.com](mailto:raypatricia@yahoo.com)

Brett Harris, WSBA #55680  
VIRGO LAW LLC  
119 1<sup>st</sup> Avenue S., Ste. 310  
Seattle, WA 98104  
Telephone: (206) 569-8418  
[Brett@virgolawseattle.com](mailto:Brett@virgolawseattle.com)